

IN THE SUPREME COURT OF MISSOURI

AMERICAN EAGLE WASTE)	
INDUSTRIES, LLC, <i>et al.</i> ,)	
)	
Respondents/Cross Appellants,)	Appeal No. SC92072
)	
vs.)	
)	
ST. LOUIS COUNTY, MISSOURI)	
)	
Appellant/Cross-Respondent.)	

BRIEF OF *AMICI CURIAE* MISSOURI MUNICIPAL LEAGUE, THE MISSOURI
MUNICIPAL ATTORNEYS ASSOCIATION AND ST. LOUIS COUNTY
MUNICIPAL LEAGUE

Appeal from the Circuit Court of St. Louis County
The Honorable Barbara Wallace, Circuit Judge

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JURISDICTIONAL STATEMENT

Amici Curiae the Missouri Municipal League, the Missouri Municipal Attorneys Association and the St. Louis County Municipal League (collectively “*Amici*”) file this Brief with the consent of all parties. The *Amici* adopt the jurisdictional statement set forth in the Brief of Appellant St. Louis County, Missouri (“County”).

STATEMENT OF FACTS

The *Amici* adopt the statement of facts set forth in the County’s Brief.

STATEMENT OF INTEREST

The Missouri Municipal League is an independent, statewide, not-for-profit association, incorporated to improve municipal government and administration in Missouri, through the unity and cooperation of Missouri cities, towns and villages for the protection and benefit of the millions of Missouri residents who live in, pay taxes to and depend upon such municipalities. The Missouri Municipal Attorneys Association is an unincorporated association comprised of attorneys who represent municipalities and other political subdivisions in the State of Missouri. The St. Louis County Municipal League is a non-profit association of St. Louis County municipalities. It serves as a vehicle for cooperation in formulating municipal policy at all levels of government and protecting and enhancing the service capacity of municipalities throughout St. Louis County in order to improve the welfare and common destiny of the several hundred thousand citizens of member municipalities.

The trial court’s judgment and composite rulings in this case will have a serious impact on Missouri municipalities, in that they expand the circumstances under which

taxpayers and the governmental services they rely upon can be put at risk, and in that the protections afforded to municipal residents and taxpayers by the public policy of the State and the doctrine of sovereign immunity would be undermined or diminished.

The trial court's award of damages in this matter has for the first time afforded a plaintiff a right to recover against a political subdivision under an implied contract theory premised on an amorphous putative "benefit" which involves no money received by the defendant and no tangible enhancement of any property or asset of the defendant government. The trial court awarded Respondent Trash Haulers over one million dollars in taxpayer funds without any Respondent providing any good, service or benefit to the residents of the County or the County itself. The County's taxpayers, as a result of the trial court's holdings, are required to pay twice for trash services, once to those companies actually providing them service and again to the Respondent Trash Haulers. Unsatisfied with their substantial judgment, Respondent Trash Haulers are counter-appealing, presumably seeking nearer the \$23 million they sought at the trial court, despite providing no good, service or benefit. Such an award would greatly exacerbate the already unlawful tax burden the judgment below places upon the County's taxpayers.

Amici will not address the substantive issue as to whether the County did indeed violate Section 260.247 RSMo. Suffice it to say for the purposes of the instant Brief that the trial court determined that the County did violate the statutory provisions.¹ It is, however, the trial court's attempt to force the square peg of a monetary judgment award

¹ *Amici* do, however, agree with and support County's arguments on this issue.

through the round hole of statutory non-compliance that causes *Amici* the greatest concern. Section 260.247 RSMo contains no penalty provision for violating its terms; but the trial court, in an attempt to create a remedy for Respondent Trash Haulers, has *sua sponte* added a penalty provision to the statute, namely that a purported non-compliance with the statute causes an implied in law contract to be formed between the County and Respondent Trash Haulers at a contract price of the estimated profits the Respondent Trash Haulers would have made had they provided trash services over a two year period. This conclusion is clearly contrary to established precedents under Missouri law and the plain reading of the Statute.

That the trial court misread and misapplied the statute to fabricate an improper remedy is further evidenced by the error of awarding Respondent Trash Haulers their lost profits,² rather than the value of an enrichment or benefit received by the County, which would be the proper measure of damages for an implied in law contract claim if such a claim were to lie in this instance.

If indeed the County did violate Section 260.247 RSMo, quasi-contract is not the proper remedy by which to enforce the statute. The statute in and of itself does not create any damage remedy of which Respondent Trash Haulers might avail themselves. It instead simply provides the procedure that a municipality is to follow in expanding its

² Respondent Trash Haulers seek their lost gross revenues, which would increase the verdict twenty fold.

own provision of trash services. *Amici* suggest that a well pleaded action in equity to prohibit or enjoin an asserted violation of the statute would be the appropriate remedy.

Amici are deeply concerned that the trial court's unprecedented expansion of what constitutes a "benefit" as an element of a claim for unjust enrichment and implied in law contract will lead to substantial erosion of the principle of sovereign immunity and an increased risk to taxpayers and the public. If the requirement for a determinable economic "benefit" is written out of quasi-contract jurisprudence, and if pursuit of validly adopted public policy and public service goals replace tangible gain as a basis for claims against governments, a whole new avenue around the taxpayer protection intended by sovereign immunity and the statute of frauds applicable to political subdivisions (Section 437.070 RSMo) will be created. Every mistake or instance of imperfect statutory procedural compliance by a public official may now allow a monetary damages claim for an implied in law contract.

In sum: (1) Respondent Trash Haulers erroneously persuaded the trial court to allow recovery on an inapt theory; (2) they then failed to satisfy all the requirements to support their chosen cause of action, and (3) they compounded these errors by inducing the trial court to award a judgment based on an improper measure of recovery. Each of these errors poses substantial risk to the local governments represented by *Amici* and the residents they serve.

The judgment below should be reversed.

ARGUMENT

I. Implied in law contract was not the proper cause of action for Respondent Trash Haulers to pursue, as no benefit was received by the County.

Respondents pursued, and the trial court granted, recovery on a theory of “implied in law contract.” *See Legal File* at 115-121; *Appendix* at A6-A7.

“The doctrine of quasi-contract, also known as a contract implied in law, is based primarily on the principle of unjust enrichment.” *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. App. W.D. 1984). This Court, in *American Civil Liberties Union/Eastern Missouri Fund v. Miller*, 803 S.W.2d 592, 595 (Mo. banc 1991), said unjust enrichment occurs when a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust.” The *Miller* Court further reasoned that “[a]n essential element of this tort is a benefit conferred upon the defendant by the plaintiff.” *Id* (internal quotations omitted; emphasis added). As recently as last month, this Court stated the elements of an unjust enrichment claim as: “(1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances.” *Hargis v. JLB Corporation*, SC91639 (Mo. banc Dec. 20th 2011) (emphasis added). This Court in *Donovan v. Kansas City*, 175 S.W.2d 874, 884 (Mo. banc 1943), went so far as to proclaim that it “is essential to the action that defendant has received a benefit from the plaintiff and that the retention of the benefit by the defendant be inequitable.” (Emphasis added). Thus, absent a “benefit”

conferred by Respondent Trash Haulers on the County, there can be no unjust enrichment and no implied in law contract.

In the trial court's order of August 5, 2010, it concluded summarily that "the Court finds County was in fact benefited in that it fully implemented its trash collection program without having to pay the existing haulers." However, cases applying an implied in law contract theory involve a definitive, discernable – generally monetary – benefit passing from the plaintiff to the defendant. For example, the cases primarily relied upon by Respondent Trash Haulers before the trial court, *Kapierz v. Esley*, 68 S.W.3d 565 (Mo. App. W.D. 2002) and *Investors Title Company, Inc. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007), each involved the recovery of money received by the defendant.³ More importantly, each of these cases Trash Haulers rely upon was brought as a claim for "money had and received,"⁴ a distinct species of implied contract not

³ In *Kapierz*, money was seized from Mr. Kapierz and improperly transferred by the Kansas City police Department to federal officials. In *Investors Title*, funds were paid to St. Louis County in excess of the statutorily permitted filing fees.

⁴ "...his cause of action for assumpsit for money had and received..." *Kapierz*, at 568. "...the trial court entered its judgment finding that Kapierz was entitled to relief under his theory of assumpsit for money had and received." *Id.* at 569. "The case was submitted to the jury on the remaining count, money had and received." *Investors Title*, 217 S.W.3d at 292.

applicable to the case now before the Court for obvious reasons (i.e. the County did not receive and does not have any money from Respondent Trash Haulers).

Similarly, in the recent case of *Pitman v. City of Columbia*, 309 S.W.3d 395 (Mo. App. W.D. 2010), the issue was a police officer's alleged "excess" payments to the city's pension program, which the officer made under the mistaken belief he was enhancing his pension benefit. As in *Karpiez* and *Investors Title*, Officer Pitman also sought recovery on the basis of "money had and received." *Id.* at 402. The Court of Appeals reversed a directed verdict for the city after determining that it could not be said as a matter of law that a jury could not find in the officer's favor. *Id.* at 403.

In cases where a defendant has been found to have been unjustly enriched by a non-monetary "benefit," the defendant has instead benefited from the efforts or materials provided by the plaintiff to the direct and measurable economic advantage of the defendant. ("In Missouri, the theory of quasi-contract has arisen most often in cases dealing with a homeowner, a general contractor and a subcontractor." *Johnson Group, Inc. v. Grasso Bros., Inc.*, 939 S.W.2d 28, 30 (Mo. App. E.D. 1997).)

The statutory reference in Section 260.247 RSMo to an optional contract with incumbent service providers in no way changes or lessens the necessity of the "benefit" element to support implied contract claims. Research has not identified any Missouri precedent premised on anything other than a benefit consisting of either money or some other calculable or measurable benefit, such as goods or services.

II. No benefit was conferred by Respondent Trash Haulers on the County.

The cases discussed *supra* require not only that there be a benefit received by a defendant, but that the benefit is provided by the plaintiff. Absent in the trial court's rulings is a finding that Respondent Trash Haulers conferred a benefit upon the County. *Appendix* at A1-A9. This missing element is fatal to a claim of an implied in law contract. Clearly, Respondent Trash Haulers did not confer a benefit upon the County. The County simply exercised its legislative discretion to better protect public health by restructuring trash services within its jurisdiction. It is simply not within the power of Respondent Trash Haulers, or any private party, to confer upon a governmental entity the right to utilize legislative discretion it already has by operation of law.⁵

⁵ The decision whether to provide utility and similar services are broad planning decisions, which are governmental in nature. *St. Joseph Light & Power Co. v. Kaw Valley Tunneling Inc.*, 589 S.W.2d 260, 267 (Mo. banc 1979). Municipalities are prohibited from delegating their governmental powers, by contract or otherwise. *Coalition to Preserve Education on the Westside v. School Districts of Kansas City*, 649 S.W.2d 533, 537 (Mo. App. W.D. 1983); and *Neil v. Gates*, 54 S.W. 460, 462 (Mo. 1899). Thus, the governmental power of determining whether to provide trash services could never have been Respondent Trash Haulers' to confer upon the County.

III. The Court awarded an improper remedy for a claim of a breach of an Implied in Law Contract

One leading treatise on contract law pithily expresses the rationale underlying both the theory of implied contract and the determination of appropriate relief:

Where the plaintiff has no alternative right on an enforceable contract, the basis of the plaintiff's recovery is the unjust enrichment of the defendant.

The Restatement of Restitution provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other.

26 *Williston on Contracts* § 68:5 (4th ed.)

Missouri courts also distinguish between two distinct types of unjust enrichment claims. “Because there has been some confusion in past cases it is necessary to point out that in Missouri there exists two separate remedies for a recovery based upon quasi-contract: unjust enrichment and *quantum meruit*.” *Johnson Group, Inc. supra*, at 30, citing *Keopke Const., Inc. v. Woodsage Const. Co.*, 844 S.W.2d 508 (Mo. App. E.D. 1992).

The *Keopke* court explicated the distinctions between unjust enrichment and *quantum meruit* and the different remedies attributable to those causes of action:

Recovery in an action of unjust enrichment depends upon whether, by the receipt of the expenditure in controversy the defendant was enriched at the loss and expense of plaintiff. As the essence of unjust enrichment lies in the fact that the defendant has received a benefit which it would be inequitable

for him to retain, it necessarily follows that the measure of recovery in a quasi-contractual action is not the actual amount of the enrichment, but the amount of the enrichment which, as between the two parties, would be unjust for one party to retain. Under the principle that one who is unjustly enriched at the expense of another is required to make restitution, the intentions of the parties have little or no influence on the proper measure of damages. In the absence of fraud or other tortious conduct on the part of the party enriched, restitution is properly limited to the value of the benefit received. These damages are distinguishable, on the other hand, from an action in *quantum meruit* in which the measure of recovery “is the reasonable value of the goods or services furnished to the benefited defendant.”

Koepke, 515-516 (emphasis added; citations omitted).

In the *Koepke* case, a company performed grading and site preparation work for a proposed real estate project and was never paid. The contractor sued under an implied contract theory for unjust enrichment. There was evidence that: (a) the value of the labor and materials provided by the contractor was \$77,000.00; and (b) that the owner of the benefitted property attributed \$31,000.00 of the sale price of the property to the value of the work performed by the contractor. The trial court found in favor of the contractor and awarded \$77,000.00. The Court of Appeals held that “[t]he trial court properly determined that Koepke Construction was entitled under Count II to recover under a

theory of unjust enrichment; however, the trial court erred in the amount it awarded to Koepke Construction under Count II.” *Id.*, at 515. The *Koepke* Court opined:

“By focusing on the value of the labor and materials provided by Koepke Construction to defendant, the trial court appears to have based the measure of damages upon *quantum meruit* rather than unjust enrichment.

Unjust enrichment permits restitution based upon the value of the benefit received. While evidence of the costs of Koepke Construction's improvements were not irrelevant, the court should focus on the benefit received by defendant. If the value of what was received and what was lost were always equal, there would be no problem with the trial court's award of \$77,705.50 to Koepke Construction. But, in fact, the evidence here suggests that plaintiff Koepke Construction has lost more than defendant has gained. By [owners's] own admission, only \$31,650.00 was attributed to the site improvements made by Koepke Construction at the subsequent sale of the Property. Thus, to the extent such amount represented a benefit to defendant, the award of at least \$31,650.00 is proper.

Id., at 516.

See also: Zipper v. Health Midwest, 978 S.W.2d 398, 412-413 (Mo. App. W.D. 1998); *Johnson v Estate of McFarlin*, 2010 WL 3947324 (Mo. App. S.D.) (Oct. 10, 2010) (“Recovery under an action for unjust enrichment is limited to the amount by which the defendant is unjustly enriched.”); and *Pitman v. City of Columbia*, *supra*, at 403, relying on *Koepke*, *supra*, and *White v. Pruiett*, 39 S.W.3d 857, 863 (Mo. App. E.D. 2001):

“The essence of unjust enrichment is that the defendant has received a benefit that it would be inequitable for him to retain. ‘Unjust enrichment permits restitution based upon the value of the benefit received’ by the defendant. The measure of recovery in a quasi-contractual action is not the actual amount of the enrichment, but the amount of the enrichment that, as between the two parties, would be unjust for one party to retain.”

White at 863.

Thus, a plaintiff must present evidence of the amount of the benefit conferred upon the defendant. Here, Respondent Trash Haulers provided no services, labor or materials so there is no claim under a *quantum meruit* theory. Likewise, the County received no money, no improvement to its property and no other tangible benefit, so there is not really any “enrichment” by which to properly measure a recovery by Respondent Trash Haulers. This conundrum affecting Respondent Trash Haulers is inherent from the underlying principles of the implied contract claim they have elected to pursue: unjust enrichment is remedied by restitution to plaintiff of that which has enriched defendant. *Williston on Contracts; Koepke; and Pitman.*

Amici are concerned that the trial court’s award of recovery based on something other than measurable financial “enrichment” flowing to the County represents an improper effort to expand the character and extent of potential claims against taxpayer resources. *Amici* respectfully suggest their discussion and application of the proper analytical framework for the unjust enrichment claim is in accord with the established

Missouri case law, and demonstrates the inapplicability of and deficiency in the trial court's award of relief.

IV. The trial court judgment is contrary to the public policy of the State and contravenes important principles intended to safeguard the public.

Section 260.247.2 RSMo gives a “city or political subdivision” two options, either (1) provide two years notice of intent to expand provision of trash collection service; or (2) negotiate a contract with existing providers to provide services for the duration of the notice period. Section 260.247.3 RSMo thereafter provides that if the City chooses to contract with the existing provides, and if the contract calls for the provision of substantially the same services, then any contract negotiated between the parties shall require that the contract price be at least the amount the incumbent trash haulers would have received if the municipality had not commenced its own trash collection services program.⁶ Therefore, this presupposes that the parties enter into a contract, that the contract requires the provision of substantially the same services and that services are actually provided.

So, unlike the statute in *Investors Title*, as discussed *infra*, which mandated the County charge a prescribed fee, the instant statute provides no such single mandatory requirement. Nothing in the statute provides that failure to give specific written notice constitutes an election to enter into an agreement, nor can it because the terms of any

⁶ This would seem to serve as a mechanism to prohibit a municipality using the statute as a bargaining tool to negotiate an unfair contract price.

agreement contemplated under the statute (scope of services, frequency of collection, manner of disposal, cost for services in excess of those previously provided by the hauler, etc.) must be negotiated by the parties.

In *Donovan, supra*, the plaintiff sought to recover “the value of the benefits accruing to defendant” from a large quantity of perishable food items delivered to and consumed at city facilities. *Id.* at 876. The *Donovan* plaintiff, through his claim in equity, sought a “money judgment of the value of the benefits to the municipality.”⁷ *Id.* (internal quotations omitted).

In considering the application of Section 432.070 RSMo (the statute governing contracts of political subdivisions), this Court’s reasoning in *Donovan* is instructive:

“Under the statute [of frauds] it is as much ultra vires for a Missouri municipality to incur a liability in the nature of a contractual obligation in the absence of a writing as to incur a liability not within the scope of its corporate powers or one not expressly authorized by law... Plaintiff does not seek the recovery of what was parted with, but a money judgment of its reasonable value or of its value to the municipality. Affording the public that protection safeguard by affirmative legislative enactment is the paramount right legally and morally; otherwise we have judge-made law contravening legislative enactments and established public policy.”

⁷ “This is on the theory of ‘no right without a remedy’ which is not necessarily of universal application.” *Donovan* at 883.

Id. at 882 (emphasis added).

The *Donovan* Court concluded that despite City receiving a definitive and tangible benefit, the fact that Kansas City had not entered into a contract in the manner required by state law precluded recovery under either a legal claim or unjust enrichment. *Id.* at 884. Perhaps in recognition of the apparent hardship placed upon the *Donovan* Plaintiff, this Court opined:

“The Missouri public policy considers the rights of the public paramount to the rights of the individual; that is, it is better to adopt, by legislation, a rule under which individuals may suffer occasionally than to permit a rule subjecting the public to injury through the possibility of carelessness or corruptness of public officials. Individual cases may present apparent hardships but it is our duty to be guided by the law...”

Id. at 885 (emphasis added).

This Court again had occasion to consider the interplay relative to an implied contract claim and the statute governing contracts by political subdivisions recently in *Investors Title, supra*. This Court held that “Section 432.070 was enacted to preclude parties who performed services for a municipality or county or other governmental entity without entering into a contract from subsequently recovering the value of those services based upon an implied contract.” *Id.* at 294. This Court in *Investors Title*, then distinguished *Donovan* and similarly decided cases:

“This situation is very different from the cases cited by County. The underlying transaction here is not illegal or outside the County’s powers; it

is specifically prescribed by the provisions of chapter 59. The concerns that the legislature sought to address by section 432.070 are not present; this is not a situation where there was a need to restrain individual officials from obligating the county to pay for or perform unauthorized actions, nor is the county receiving services from other parties where the county has not properly approved an agreement for specific work at a specific price.”

Id. at 295 (emphasis added).

Herein lies the key distinction between the instant case and *Investors Title*. The County is being charged with an implied in law contract to cover the provision of trash services where no agreement was formed in accordance with Section 437.070 RSMo. Further, no services were ever agreed to be provided, or ever actually provided, by the Respondent Trash Haulers.

The trial court, mislead by Respondent Trash Haulers into fashioning a monetary remedy, lost sight of the public policy of this state to protect against the wasteful expenditure of public monies. This case underscores the need to protect the public from the kind of judgment entered by the trial court.

In all the cases discussed herein, the plaintiffs were seeking the return of a discrete and discernable sum of money they had given to a political subdivision. Conversely, Respondent Trash Haulers seek money neither they nor anyone put into the County’s coffers. Instead the money they seek must come from the County’s general revenue (in the form of a money judgment), which is funded by tax payments from the County’s residents.

The doctrine of sovereign immunity serves to protect against the expenditure of public funds, in all but two statutorily specified circumstances, for reasons related to the misdeeds of municipalities or their officials or employees.⁸ Claims for breach of contract are not barred by the doctrine of sovereign immunity. *Kunzie v. City of Olivette*, 184 S.W.3d 570, 575 (Mo. banc 2006). Rather, it is the statute governing contracts with political subdivisions, Section 432.070 RSMo, that protects taxpayers against exposure to unfounded lawsuits for breach of contract by requiring specific formalities and procedures that must be satisfied before a contract is binding upon a political subdivision. Clothing an unjust enrichment claim with contract terminology forges an end-around to the dual taxpayer protections erected by the doctrine of sovereign immunity and the statute governing contracts of political subdivisions, leaving an unpredictable avenue of potentially limitless liability to be paid from municipal general revenues.

⁸ Operation of a motor vehicle within the course of a public employee's employment and a dangerous condition on public property. Section 537.600 RSMo.

CONCLUSION

For the reasons stated herein, *Amici* urge this Court to decline to extend the scope of implied in law contract and unjust enrichment claims to the instant case, as to do so will harm the vital public policy goals of preventing wasteful expenditure of taxpayer revenue. If, however, this Court should determine that an unjust enrichment claim does lie, *Amici* ask that this Court apply the proper measure of damages, namely the value of the “enrichment” of the County, which “enrichment” had no pecuniary value.

WHEREFORE, *Amici Curiae* respectfully request that this Court reverse the trial court’s award of damages entered in the instant case.

Respectfully submitted,

CURTIS, HEINZ, GARRETT & O’KEEFE

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served on Respondent/Plaintiff this 3rd day of January, 2012, through the Court's electronic filing system:

/s/ Kevin M. O'Keefe

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,350, excluding the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Symantec anti-virus program.

/s/ Kevin M. O'Keefe